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In the Supreme Court of the United States

LEGAL SERVICES CORP., *Petitioner,*
v.
CARMEN VELAZQUEZ, ET AL., *Respondents.*

UNITED STATES OF AMERICA, *Petitioner*
v.
CARMEN VELAZQUEZ, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether § 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321–55 violates the First Amendment, because it precludes recipients of Legal Services Corporation funds from participating in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system" but allows representation of "an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation."

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the nation. WLF regularly appears in legal proceedings before federal and state courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this and other federal courts in cases involving the validity of restrictions on Legal Services Corporation (LSC) funds and the proper administration of welfare programs. *See, e.g., Legal Aid Soc'y of Hawaii* v. *Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998); *Saenz* v. *Roe*, 526 U.S. 489 (1999).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on several occasions.

Amici submit this brief in support of Petitioners and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

SUMMARY OF ARGUMENT

This case illustrates the truth of the adage, "No good deed ever goes unpunished." When Congress decided to prohibit LSC fund recipients from attempting to upend welfare laws, it generously carved out an exception to let poor Americans receive free legal assistance in seeking welfare benefits. To prevent its generosity from being used to subvert its prohibition, Congress limited the exception to

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

individual suits for welfare relief and expressly prohibited LSC fund recipients from using such suits to attack welfare laws. This and other restrictions were challenged on First Amendment grounds, and the Second Circuit upheld the generosity but struck down the proviso as viewpoint discrimination. For three reasons this Court should reverse.

First, the suit-for-benefits exception comfortably falls within this Court's government subsidy decisions. Those decisions establish that Congress holds broad power to attach limitations on the programs it subsidizes, even when such limitations are challenged on the ground of viewpoint discrimination. Like restrictions on tax benefits or abortion subsidies, which the Court has upheld, the suit-for-benefits exception reflects the congressional aim of confining the uses to which LSC funds may be put. Moreover, the suit-for-benefits exception neither directly regulates speech—limiting subsidies for legal representation is no more a restriction on speech than limiting subsidies for abortion services—nor imposes a criminal penalty.

Second, unless reversed, the Second Circuit's decision threatens to shift the power to define government subsidies from legislatures to courts. Concerned lest it inadvertently assume powers rightly belonging to elected representatives, the Court has traditionally cabined constitutional claims directed at forcing the government revise its subsidies in favor of the claimants. The Second Circuit's holding boils down to the contention that it is for the lawyer advising an indigent client, rather than for Congress, to decide the range of legal services in which LSC fund recipients may participate. Unless reversed, this decision will encourage others to use the First Amendment as a tool to obtain in court what they were denied in the legislature.

Third, such a revolution in our constitutional understanding is put in further doubt by the flimsiness of the viewpoint discrimination claim in this case. "Opposition to current welfare law" consists of no discernible viewpoint at all. Instead it is so capacious a concept as to include Republicans, Democrats, and Trotskyite Socialists. An idea so inclusive simply lacks the distinctiveness necessary to warrant this Court in striking down an Act of Congress on the ground of viewpoint discrimination.

ARGUMENT

This case presents the question whether § 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321–55, discriminates on the basis of viewpoint in violation of the First Amendment. According to the United States Court of Appeals for the Second Circuit, "the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law." Pet. App. 35a.[2] The court attempted to anchor this holding in a peculiar reading of *Rust* v. *Sullivan*, 500 U.S. 173 (1991). "[W]e think it inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy." Pet. App. 32a. However, a close reading of *Rust* and the line of decisions on which it rested reveals that the Second Circuit was profoundly mistaken. The suit-for-benefits exception is fully consistent with the government's broad power

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[2] Unless otherwise noted, all citations to the Petition, Petitioner's Appendix, and Brief in Opposition refer to documents filed in No. 99-960.

to enforce limits on its subsidies, even when such limits are challenged on First Amendment grounds. To more clearly see where the Second Circuit stumbled, it is necessary to review *Rust* in some detail.

I. THE SUIT-FOR-BENEFITS EXCEPTION FALLS COMFORTABLY WITHIN THE GOVERNMENT'S BROAD POWER TO FIX LIMITS ON ITS SUBSIDIES, EVEN WHEN SUCH LIMITS ARE CHALLENGED ON THE GROUND OF VIEWPOINT DISCRIMINATION

A. The Suit-for-Benefits Exception Amply Satisfies the Rule of *Rust* v. *Sullivan*

Rust involved the facial validity[3] of Department of Health and Human Services (HHS) regulations limiting the abortion services offered by programs funded under Title X of the Public Health Services Act, 84 Stat. 1506, as amended, 42 U.S.C. §§ 300–300a-6. Section 1008 of the Act provided that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. HHS regulations implementing § 1008 attached three pertinent restrictions on the use of Title X funds. First, the regulations made it clear that a "Title X project may

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[3] That the statute was challenged on its face rather than as applied played a prominent role in deciding the case. The Court emphasized that a party challenging a law on its face bears "a heavy burden." *Rust*, 500 U.S. at 183. "'[T]he challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.'" *Id.* at 183 (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). And the Court relied on that high standard as the basis for rejecting certain First Amendment claims. *See, e.g., id.* at 195, 195 n.4.

not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. § 59.8(a)(1) (1989). Accordingly, the regulations directed a Title X recipient to answer questions regarding abortion by replying that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* at § 59.8(b)(5).

Second, Title X projects were precluded from taking any steps to "encourage, promote or advocate abortion as a method of family planning." *Id.* at § 59.10(a). Prohibited activities, when aimed at "promot-[ing] . . . abortion as a method of family planning," *id.*, included lobbying, publishing, providing speakers, legal action, and dues-paying membership in organizations for which abortion advocacy forms "a substantial part of its activities." *Rust*, 500 U.S. at 180.

Third, the regulations mandated that Title X projects be "'physically and financially separate" from prohibited abortion activities." 42 C.F.R. § 59.9 (1989). To be deemed separate the regulations mandated that "a Title X project must have an objective integrity and independence from prohibited activities." *Id.* HHS regulations listed several factors to determine the presence or absence of "objective integrity and independence," *id.*, including "separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities." *Rust*, 500 U.S. at 181.

These regulations were challenged on several constitutional grounds, among them viewpoint discrimination. It was alleged that "the regulations . . . impermissibly discriminat[e] based on viewpoint because they prohibit 'all discussion about abortion as a lawful option—including counseling, referral, and

the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.'" *Id.* at 192 (quoting Br. Pet. 11 (No. 89-1391)).

The Court disagreed, finding "no question but that the statutory prohibition contained in § 1008 is constitutional." *Id.* Its chief reason for doing so lay with the following principle:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id. at 193. To justify its reliance on this rule, the Court established two lines of defense.

First, the Court set out those principles that had traditionally governed its decisions regarding the validity of government subsidies. 1. A refusal to fund an activity is not equivalent to a penalty on that activity. *See id.* 2. Government interference with a constitutionally protected activity differs from the government's encouragement of only those activities that conform with its policy. *See id.* 3. If the government unconstitutionally discriminates based on viewpoint whenever it sets limits on what activities it funds, numerous government subsidies would be "constitutionally suspect." *Id.* at 194. 4. When the government subsidizes a single protected right, it need not subsidize "analogous counterpart rights." *Id.* Taken together, these principles mean that "[w]ithin far broader limits than petitioners are willing to

concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.*

Second, the Court articulated its reasons for regarding § 1008 and the HHS regulations as legitimate exercises of the government's broad power to enforce limits on its own subsidies. 1. The Court described the challenged regulations as being "designed to ensure that the limits of the federal program are observed." *Id.* at 193. 2. The Court denied that the Title X regulations directly aimed at "'suppressing a dangerous idea,'" *id.* (quoting *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983), in turn quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)). Instead, the Court described the challenged statute as "a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Id.* at 194. 3. On a related point, the Court distinguished *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 234 (1987), where a state sales tax was found invalid because it discriminated among magazines based on their content. "[W]e have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the project funded." *Id.* at 194–95.

Contrary to the Second Circuit, which found it "inconceivable," Pet. App. 32a, to let *Rust* decide this case, the similarities between the suit-for-benefits exception at issue here and the abortion subsidy restrictions upheld in *Rust* are striking. First, as its language demonstrates, the suit-for-benefits exception was plainly "designed to ensure that the limits of the federal program are observed." *Id.* at 193.

Section 504(a)(16) prohibits the use of LSC funds by anyone—

> (16) that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency *if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.*

The italicized words met their untimely end in the Second Circuit's buzz saw. *See* Pet. App. 28a. Yet these words manifestly serve the legitimate purpose of fixing a limit on the activities for which congressional funding is available. The exception allows LSC fund recipients to represent a single client who seeks "specific relief from a welfare agency." Congress thereby stated its willingness to subsidize legal representation for persons needing assistance to obtain welfare benefits. A poor widow could rely on this language to obtain federally subsidized legal representation in her effort to obtain Social Security benefits, for instance. However, Congress set a limit on its largesse. Not coincidentally it drew that limit at the point where the exception might swallow the rule. For that reason, the proviso virtually restates the general prohibition: LSC recipients may not transform a suit for benefits into a suit challenging current welfare laws. The suit-for-benefits exception thus bears the unmistakably imprint of Congress's design "to ensure that the limits of the federal program are observed." *Rust*, 500 U.S. at 193.

Second, the suit-for-benefits exception does not aim to "'suppress[ ] a dangerous idea,'" *id.* (quoting *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983), in turn quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)). As in *Rust*, the restriction on LSC funding is accurately described as a constraint on "engaging in activities outside of the project's scope." *Id.* at 194. For that reason Congress expressed its intent using words conferring limited permission on LSC recipients to represent individual clients seeking welfare assistance but not clients seeking to change the system. However controversial as a political matter, *Rust* teaches that such selective funding decisions do not amount to an unconstitutional penalty on speech.

So much establishes that the Second Circuit misread *Rust* when it managed to find the suit-for-benefits exception invalid as viewpoint discrimination. But the lower court's mistake runs deeper than it first appears, because *Rust* was no sport. It stands in a long line of this Court's decisions, which establish beyond cavil that the government enjoys broad power to fix limits on its subsidies, even when such limits are challenged on the ground of viewpoint discrimination.

B. The Suit-for-Benefits Exception Also Fits Within this Court's Other Government Subsidy Decisions

More than a century ago this Court established the principle that government subsidies are seldom vulnerable to constitutional attack. In *United States* v. *Realty Company*, 163 U.S. 427 (1896) the Court upheld certain bounties for sugar producers against the claim that Congress lacked the power to appropriate funds for that purpose. *Id.* at 443–44. The Court noted that "generally such a question must

in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government." *Id.* at 444.

Cincinnati Soap Co. v. *United States*, 301 U.S. 308 (1937) reiterated that lesson in a case involving the validity of a federal tax on coconut oil to be paid into the Treasury of the Phillippines. *Id.* at 311–12. There the Court rejected the claim that this appropriation to a foreign treasury exceeded Congress's powers "to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. "Primarily, and in a very high degree, whether a tax serves any of these purposes is a practical question addressed to the lawmaking department. And it will require a very plain case to warrant the courts in setting aside the conclusion of Congress in that regard." *Id.* at 313 (citation omitted).

This constitutional understanding of the broad power of the legislature over public subsidies was elaborated and applied to the First Amendment in *Cammarano* v. *United States*, 358 U.S. 498 (1959). There the Court unanimously sustained Treasury regulations that denied income tax deductions for funds spent trying to defeat statewide initiatives in Washington and Arkansas. *Id.* at 499. It rejected the argument that denying a tax deduction for these purposes infringed the freedom of speech. *See id.* at 513. In support of this holding the Court emphasized the distinction so crucial in *Rust*, between selective funding and viewpoint discrimination. "Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as

everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." *Id.* The Court went on to say that the challenged regulations were "plainly not "'aimed at the suppression of dangerous ideas.'" *Id.* (quoting *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958), in turn quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950)). Instead the Court found that the regulation served the legitimate purpose of ensuring that "everyone in the community should stand on the same footing" regarding the purchase of advertising aimed at affecting legislation. *Id.* at 513.

Maher v. *Roe*, 432 U.S. 464 (1977) and *Harris* v. *McRae*, 448 U.S. 297 (1980) confirmed the Court's adherence to the rule giving legislatures broad leeway to limit subsidies—and they did it in the highly contentious field of abortion. *Maher* held that a Connecticut regulation excluding Medicaid benefits for nontherapeutic abortions did not infringe the constitutional right recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973). *See Maher*, 432 U.S. at 474. The Court found that Connecticut "has imposed no restriction on access to abortion that was not already there" by virtue of the poverty of women seeking a subsidized abortion. *Id.* This conclusion was influenced by the Court's traditional understanding that policy decisions rightly belong in the hands of elected legislators. "[W]hen an issue involves policy choices as sensitive as those implicated by the public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature." *Id.* at 479. *Harris* held that the Hyde Amendment, which restricted federal funding for abortions, was consistent with the Due Process Clause of the Fifth Amendment. *See Harris*, 448 U.S. at 317. Two reasons guided the Court toward this

conclusion. First, it found that Congress had not burdened the right to an abortion when it refused to fund abortion. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* Second, the Court stressed that the presence of a constitutional right does not obligate the government to subsidize the exercise of that right.

> To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.

Id. at 317–18 (footnote omitted).

Regan v. *Taxation with Representation*, 461 U.S. 540 (1983) further clarified the Court's understanding of the relation between constitutional rights and the duty of government to subsidize them. It presented a First Amendment challenge to § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), which denies tax exempt status when a substantial part of the petitioning organization's activities consists of lobbying. *See id.* at 550–51. Taxation with Representation of Washington (TWR) argued that Congress violated the Free Speech Clause when it excluded lobbying from § 501(c)(3). *See id.* at 545. The Court stoutly disagreed, saying that it had "never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right." *Id.* This is so, the Court reasoned, because, as in *Maher* and *Harris*, the financial obstacles preventing TWR from lobbying as it wished

existed because "TWR does not have as much money as it would like" and not because Congress has refused a subsidy. *Id.* at 550. The Court concluded its discussion with a ringing affirmation of the power of elected officials to structure government subsidies in the public interest. "Where governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas' . . . its 'power to encourage actions deemed to be in the public interest is necessarily far broader.'" *Id.* at 550 (quoting *Maher*, 432 U.S. at 476 and *Cammarano*, 358 U.S. at 513).

Only two terms ago this Court had occasion to apply *Rust* in a case posing many of the same issues presented here. *NEA* v. *Finley*, 524 U.S. 569 (1998), held that 20 U.S.C. § 954(d)(1), which obligated the NEA to assess grant applications "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public," did not unconstitutionally discriminate based on viewpoint. *Id.* at 572. Certain disappointed grant applicants had argued that § 954(d)(1) violates the First Amendment on its face, "because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency." *Id.* at 580. For several reasons, the Court disagreed.

First, the Court disputed the applicants' broad interpretation of § 954(d)(1). They read it to mean that the law imposed mandatory content-based standards on the NEA. *Id.* Instead the Court found that the provision "imposes no categorical requirement," *see id.* at 581, but rather "admonishes the NEA merely to take 'decency and respect' into consideration, and . . . aim[s] at reforming procedures rather than precluding speech." *Id.* at 582.

Second, based on this interpretation of § 954(d)(1), a majority found that the applicants' facial attack failed, because the provision did not "engender the

kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face." *Id.* at 583. Unlike the hate speech provision struck down in *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992), the Court pointed out, the "decency and respect" provision did not "set forth a clear penalty, proscribe[ ] views on particular 'disfavored subjects,' and suppress[ ] 'distinctive ideas, conveyed by a distinctive message.'" *Finley*, 524 U.S. at 582 (quoting *R.A.V.*, 505 U.S. at 391, 393).

Third, the Court distinguished the "decency and respect" provision from the student-funded subsidy at issue in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Unlike the limited public forum created by the University of Virginia in *Rosenberger*, NEA grants are competitive, meaning that the government does not "indiscriminately 'encourage a diversity of views from private speakers.'" *Finley*, 524 U.S. at 582 (quoting *Rosenberger*, 515 U.S. at 834).

Fourth, while acknowledging that the suit presented a facial challenge, the Court noted in passing that certain applications of the "decency and respect" provision would pose constitutional infirmities because such applications would cause "the suppression of disfavored viewpoints." *Id.* at 587. The provision might be at risk, for instance, "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." *Id.* The same result might obtain if the provision had been "'manipulated' to have 'a coercive effect.'" *Id.* (quoting *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) or if it imposed "a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Id.* (quoting *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502

U.S. 105, 116 (1991). However, the Court distinguished such cases, noting again that the nature of a facial challenge did not present them. *Id.* at 586.

Fifth, echoing its holding in *Rust*, *see* 500 U.S. at 193, the Court stated that the First Amendment does not generally preclude Congress from limiting subsidies as it thinks best:

> [A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protect rights, Congress has wide latitude to set spending priorities.

Id. at 587–88.

This line of cases, stretching from *United States* v. *Realty Company*, 163 U.S. 427 (1896) to *NEA* v. *Finley*, 524 U.S. 569 (1998) establishes the principle that the government enjoys broad power to enforce limits on the subsidies it provides. Section 504(a)(16)'s suit-for-benefits exception comfortably fits within that principle. It neither directly regulates speech—limiting subsidies for legal representation is no more a restriction on speech than limiting subsidies for abortion services—nor imposes a criminal penalty. Like the lobbyists in *Regan*, the would-be abortion providers in *Rust*, and the "*[a]vant-garde artistes*," 524 U.S. at 595 (Scalia, J., concurring in the judgment), in *Finley*, Respondents in this case have presented a demand for money gussied up in the language of constitutional rights. But the language of § 504(a)(16) does not warrant departing from this Court's traditional understanding that Congress holds broad power to decide what activities deserve public funding,

even when such decisions are challenged on the ground of viewpoint discrimination.

II. UNLESS REVERSED, THE SECOND CIRCUIT'S DECISION THREATENS TO SHIFT THE POWER TO DEFINE GOVERNMENT SUBSIDIES FROM LEGISLATURES TO COURTS

From the vantage point supplied by a review of this Court's government subsidy decisions, one notices that the Second Circuit's decision is revolutionary. The consistent lodestar of previous decisions has been the Court's understanding that choosing how to spend public funds nearly always belongs in the hands of elected representatives, not courts. *See United States* v. *Realty Company*, 163 U.S. 427, 444 (1896); *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 313 (1937); *Maher* v. *Roe*, 432 U.S. 464, 479 (1977); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550 (1983); *Finley*, 524 U.S. at 588. Indeed, the Court has repeatedly framed the extent of judicial review in government subsidy cases in the narrowest possible terms. It has used the phrases "rarely, if ever," *Realty Company*, 163 U.S. at 444, and "a very plain case" *Cincinnati Soap Co.*, 301 U.S. at 313, to describe cases where a subsidy might be invalidated, while using the phrases "far broader," *Rust*, 500 U.S. at 194, and "wide latitude," *Finley*, 524 U.S. at 588, to describe the field of legislative discretion.

Members of the Court have recognized that constitutional claims, if not cabined in the context of government subsidies, will endanger democratic accountability. Justice Frankfurter aptly summarized those concerns in the following passage from his concurring opinion in *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946):

> It seems to me important strictly to confine discussion in this case because its radiations touch, on the one hand, the very basis of a free society, that of the right of expression beyond the conventions of the day, and, on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise, whether the world of matter or of mind.

Id. at 160 (Frankfurter, J., concurring).

To guard against the danger of allowing constitutional claims to engulf the principle of democratic self-governance, the Court has erected a wall out of the following principles. 1. Government does not abridge the freedom of speech merely because it refuses to fund speech. *See Cammarano* v. *United States*, 358 U.S. 498, 513 (1959); *Harris* v. *McRae*, 448 U.S. 297, 317 (1980); *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). 2. More generally, a constitutional right does not carry with it a duty by the government to subsidize that right, since the government has no constitutional duty to remove financial obstacles that it did not create. *See Maher*, 432 U.S. at 474; *Harris*, 448 U.S. at 317; *Regan*, 461 U.S. at 550. 4. As a corollary, when the government subsidizes a single protected right, it need not subsidize "analogous counterpart rights." *Rust*, 500 U.S. at 194. 5. "Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *Id.* at 195 (citations omitted).

The lower court's decision threatens to tear down this wall. That decision holds that "the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law." Pet. App. 35a. But

"existing law" means nothing more or less than the sum total of legislative decisions granting, withholding, and conditioning the receipt of welfare benefits. If opposition to these decisions qualifies as viewpoint discrimination, it is difficult to imagine a federal subsidy that remains immune from First Amendment challenge.

The decision below thus "casts doubt upon a wide variety of tax preferences and subsidies." *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting). This raises serious practical questions. Must Congress now choose between funding all related activities or denying funding to any of them? If Congress may not attach a proviso to the suit-for-benefits exception, how can it prevent any subsidy from being used contrary to its intended purposes? More troubling still is the question whether the decision below will be allowed to erode this Court's consistent injunction that denying a subsidy for speech is not an abridgment of speech. The viewpoint discrimination claim here boils down to the argument that the lawyer advising an indigent client, rather than Congress, ought to determine the range of legal services in which LSC fund recipients may participate. One of its most troubling implications is that the Second Circuit's decision allows Respondents to use the First Amendment as a means of getting subsidies in court that they lost in the legislature. But that decision is wrong. This Court's decisions plainly teach that constitutional litigation should not be treated as a more highly evolved form of lobbying.

Such reservations are heightened when one discovers that, strictly speaking, the suit-for-benefits exception does not really consist of a viewpoint at all.

III. THE SUIT-FOR-BENEFITS EXCEPTION DOES NOT CONSIST OF A VIEWPOINT FOR PURPOSES OF FIRST AMENDMENT ANALYSIS

Viewpoint discrimination captures the idea that "[e]specially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785 (1978). Or as Justice Scalia has more colorfully phrased it, the First Amendment forbids the government "to license one side of a debate to fight freestyle while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 392 (1992). Whether the suit-for-benefits exception counts as viewpoint discrimination matters because "in general, viewpoint-based restrictions on expression require greater scrutiny than subject-matter-based restrictions." *Id.* at 431 (Stevens, J., concurring in the judgment).

The Second Circuit defined the relevant viewpoint as "a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal." Pet. App. 33a (footnote omitted). Respondents characterize it, on the other hand, as an effort "to subsidize pro-government speech, while withholding support from anti-government speech." Br. Opp. 7. The court's definition breaks down into the following parts: (1) an argument that a law obstructing a client's claim for welfare benefits is somehow unlawful; (2) made by a lawyer; (3) before a court of law. Leaving aside the potentially diverting questions of whether the lawyer is the relevant speaker in this case and whether a court constitutes an expressive forum, the

whole constitutional inquiry may be brought to a screeching halt by pointing out that "opposition to current welfare laws" is no viewpoint at all.

Compare it, for example, with two recent cases where the Court employed viewpoint discrimination to strike down a law on its face. *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992) presented the question whether the following municipal ordinance was facially invalid as being viewpoint discriminatory:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). The Court found little difficulty in identifying the viewpoint discrimination. "[F]ighting words' that do not themselves invoke race, color, creed, religion or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents." *Id.* at 391.

In *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court overturned a school district's decision to deny a church access to a public school for the purpose of showing religiously-oriented films on families and child-rearing. *Id.* at 394. The New York Court of Appeals had ruled that the restriction was viewpoint neutral because it did not discriminate among religions; the Court disagreed. It found that the

"critical question" was not whether all religions were treated alike, but whether religious opinions were unfavorably treated in comparison with other opinions. *Id.* In particular, the Court identified religious "views about family issues and child rearing" as the relevant viewpoint.

Both *R.A.V.* and *Lamb's Chapel* thus centered on "a distinctive idea, conveyed by a distinctive message." *R.A.V.*, 505 U.S. at 393. The municipal hate speech ordinance in *R.A.V.* permitted the use of "'fighting words'" that do not themselves invoke race, color, creed, religion, or gender'" if employed to defend "racial, color, etc., tolerance and equality," but not if the speaker opposed such tolerance and equality. *Id.* at 391. The school district rule at issue in *Lamb's Chapel* allowed access to the school for all sorts of presentations on family issues, except for religious presentations. *Lamb's Chapel*, 508 at 394.

Given these precedents, the proviso contained in the suit-for-benefits exception is not a viewpoint: it does not qualify as "a distinctive idea, conveyed by a distinctive message." *R.A.V.*, 505 U.S. at 393. "Opposition to current welfare laws" is so capacious a concept as to embrace Democrats, Republicans, and Trotskyite Socialists. Since the potential grounds for criticizing current welfare laws are almost certainly greater than the number of welfare laws themselves, "opposition to current welfare laws" comprises not only multiple viewpoints, but countless ones.

Moreover, as Professor Greenawalt has explained, the kind of viewpoint cognizable under the First Amendment requires competitors. "One might say that a distinction between political advocacy and physics is one of viewpoint; speech with a scientific viewpoint is treated differently from speech with a political viewpoint. But this is not viewpoint discrimination in the sense of favoring one competing

point of view over another." Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 701 (1996). To be distinctive the idea behind the suit-for-benefits exception would have to exclude a discernible class of competing speakers. But the only competitors arrayed against those speakers for whom "opposition to current welfare laws" counts as a message is the class represented by the poor widow seeking to obtain Social Security benefits. And the members of that class presumably have no interest in debating the merits of welfare laws. Rather, their sole interest lies in obtaining welfare benefits to which they can assert a legal right. Because "opposition to current welfare laws" does not entail competing speakers, it is not the kind of viewpoint that qualifies for First Amendment protection.

Finally, it should be added that "opposition to current welfare laws," if allowed to count as a viewpoint for purposes of First Amendment analysis, would sanction all sorts of mischief. "Opposition to drug laws," "opposition to tax laws," and "opposition to civil service laws" are just a few of the possibilities. But nothing in the First Amendment prevents this Court from slamming the lid on Pandora's Box.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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